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IN THE

Supreme Court of the United States

October Term, 1967.

No. **1189**

MAURICE A. KRISEL,

Petitioner,

against

RAFAEL DURAN, SAM VAN HINING, PHILLIPS PETROLEUM COMPANY and ECONOMIC DEVELOPMENT ADMINISTRATION OF PUERTO RICO,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1968

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RAFAEL DURAN, SAM VANHINING, PHILLIPS PETROLEUM COMPANY and ECONOMIC DEVELOPMENT ADMINISTRATION OF PUERTO RICO,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 6, 1967.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (App., *infra*, pp. 23-52) is reported in 258 F. Supp. 845. The opinion of the Court of Appeals (App., *infra*, pp. 19-22) is reported in 386 F. 2d 179.

Jurdisdiction.

The judgment of the Circuit Court of Appeals was entered December 6, 1967. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. As a general principle of the law of federal jurisdiction, may a United States District Court exercise diversity of citizenship jurisdiction in an action for breach of contract or for tort brought by a citizen of the state in which the Court sits against an agency or instrumentality of another state if such agency or instrumentality is engaged in proprietary, commercial-type activities in the former state as well as in other states and foreign countries?

2. In this specific case, is an Agency created by the Commonwealth of Puerto Rico (Economic Development Administration of Puerto Rico, herein E.D.A.) for the purpose of engaging in economic research, the encouragement and development of industrial enterprises, and the promotion of tourism and sale of Puerto Rican rum a "citizen" of Puerto Rico within the meaning of the diversity of citizenship jurisdiction of the U. S. District Courts?

Statutes Involved.

The pertinent portions of the Constitution and of the statutes of the United States are set out in the Appendix, *infra*, p. 17.

Statement.

The Economic Development Administration of Puerto Rico (E.D.A.), has its principal office in San Juan, seven offices in the Continental United States and several in foreign countries. It was created by the Governor by Reorganization Plan No. 10 (Laws of Puerto Rico Title 23, §231), in 1950 to conduct the functions, previously exercised by the Puerto Rico Industrial Development Company (PRIDCO), of tourism, industrial development, economic research and the promotion of the sale of Puerto Rican rum. PRIDCO had been created as a separate corporation, with the express power to contract, to sue and be sued, and to carry out various economic and commercial development programs.

After 1950 PRIDCO and E.D.A. were merged into two interlocked divisions of one organization, with the administrator operating and controlling both. The PRIDCO division in June, 1966, had assets of over $150,000,000.

The plaintiff in this case, a resident of New York and a member of the New York Bar, who had long been associated with business enterprises in Puerto Rico, in 1961, disclosed to the defendants, including the E.D.A. and its officers and agents, Durand and Van Hyning, a novel idea and program for a petro-chemical complex to be constructed in Puerto Rico. Because of Federal quota restrictions upon the import of oil into Puerto Rico, such a plan could not be carried out without a long-term, large quantity quota. The plaintiff's program, which was confirmed in large measure to the E.D.A. officials at their invitation in a letter marked "Confidential," involved a method of obtaining a change in the oil quota regulations so as to permit imports from Venezuela of as much as 50,000 barrels of petroleum products per

day. The Administrator of E.D.A., however, advised the plaintiff that his plan was impossible of performance, and his proposal was rejected.

Negotiations between E.D.A. and Phillips Petroleum Company (Phillips) were conducted between 1963 and 1965 and culminated in an agreement under which E.D.A. agreed to support an application to the Federal Government for a change in the Federal Oil Import Regulations to allow for the granting to Phillips of a long-term 50,000 barrels a day quota as the base for establishment in Puerto Rico of a refinery and petro-chemical complex. Both the method of accomplishing the change in quota regulations, and the kind and scale of quota envisaged by Phillips, as well as the use to which it would be put by Phillips, conformed in every significant aspect with the plaintiff's proposal divulged to E.D.A. in 1961 in confidence. When the quota applied for by Phillips with E.D.A. sponsorship was granted, a formal contract was entered into between E.D.A. and Phillips that will represent investments aggregating approximately 600 million dollars. Under this contract the Administrator provided for the Commonwealth's 25% share of the new refinery and petrochemical complex to be issued to the PRIDCO division of his organization. When plaintiff learned of the Phillips-E.D.A. program, he promptly advised the parties as to his claims arising out of the consummation of the plan that he had proposed. The plaintiff on or about September 7, 1965, instituted an action against E.D.A. and Phillips claiming commensurate damages for breach of contract and tortious misappropriation of plaintiff's program idea.

After institution of this action, the defendants moved for dismissal on various grounds, including, with respect to E.D.A., lack of jurisdiction in the United States Dis-

trict Court for the Southern District of New York because of (a) the sovereign immunity of the Commonwealth of Puerto Rico, and (b) the absence of diversity of citizenship. The decision of the District Court granted E.D.A.'s motion on the ground of "lack of jurisdiction over the subject matter based on non-diversity of citizenship." On appeal, the United States Court of Appeals for the Second Circuit affirmed in an opinion holding that E.D.A. as the "alter ego" of the Commonwealth of Puerto Rico, is not "a citizen for the purpose of diversity jurisdiction."

Reasons for Granting the Writ.

The result reached below is in conflict with the decision of the Court of Appeals for the Third Circuit on a matter of serious and increasing importance to the jurisdiction of the Federal Courts. The decision of the Court of Appeals here, if allowed to stand, would close the diversity of citizenship jurisdiction of Federal Courts to all suits, not involving a federal question, by a citizen of one state against another state, or its agency, despite a growing tendency of all courts to narrow the range of sovereign immunity. The Court of Appeals for the Third Circuit, in *Gerr v. Emrick,* 283 F. 2d 293 (1960); cert. denied 365 U. S. 817, held that the Federal Courts do have such jurisdiction.

The issue of Federal jurisdiction in cases of this kind is of major importance today, and its significance will increase. Every state of the Union, including Puerto Rico, is increasingly carrying on proprietary activities through all kinds of agencies and instrumentalities corporate and otherwise, doing business with citizens of almost every other state. Therefore, it has become a matter of transcendent importance in the administration of justice in interstate transactions for this Court to

settle the question of the diversity jurisdiction of Federal Courts when disputes arise between such agencies or instrumentalities and citizens of other states.

1. There is a Conflict Among the Circuits.

(a) Petitioner contends that the decision below conflicts with the decision of the Court of Appeals for the Third Circuit in the *Gerr* case. Diversity jurisdiction was exercised in that action against an agency of the State of Pennsylvania, its Turnpike Commission. The Court of Appeals here sought to distinguish the *Gerr* case on the ground that the Pennsylvania Turnpike Commission "was not the *'alter ego'* of the state, that it had the *'status'* of 'a municipal corporation' and was therefore a citizen of the state for purposes of diversity." The United States Court of Appeals in the *Gerr* case concluded that the agency involved had the *"status"* of "a municipal corporation," although performing an essential *governmental* function of the Commonwealth of Pennsylvania. The Court concluded that the Turnpike Commission, unlike the Commonwealth, generally, is required to pay interest on its condemnation awards, and therefore does not have the same status as the Commonweath of Pennsylvania before the Courts. This conclusion was the basis of denial of sovereign immunity for the agency of the state, which therefore became "a 'citizen' of the state for purposes of diversity of citizenship jurisdiction" (page 297 of 283 F. 2d). The decision indicates that the Court felt that diversity jurisdiction exists whenever a state agency, of whatever kind, does not warrant immunity as a sovereign.

In the present case, the Court below held that there is no diversity jurisdiction when the agency of the state, even if lacking sovereign immunity, is created by the state in such a manner as to be the state's *"alter ego."* This rationale would bestow on the state the power to

decide for itself, *by the form in which it chooses to engage in business,* whether or not it will be immune and consequently subject to federal diversity jurisdiction. A state, however, must use some support other than its own bootstraps when it seeks to elevate the proprietary activities of a specially created agency into a status of immunity to suit in courts whose jurisdiction it does not control. Immunity or amenability in those courts must depend on the nature of the state's activity, not the internal arrangement of its administration.

(b) Another judge, sitting in the District Court in the Third Circuit, in *S. J. Groves & Sons Co. v. New Jersey Turnpike Authority,* 268 F. Supp. 568 (D.C.N.J. 1967) has held that diversity jurisdiction exists in an action against the New Jersey Turnpike Authority. His opinion contains numerous statements supporting the petitioner's view on this issue. The Turnpike Authority was admittedly established with a structure that differs from the E.D.A.'s, but the principles applied by the Court are applicable to both agencies. For example, he stated:

> "That it performs an essential governmental function as an instrumentality of the state is *not* disputed. Nevertheless, New Jersey courts repetedly have held that its fortunes were not so closely tied to the state as to make it a mere nominee or *alter ego.* In light of all these factors the Authority is not protected by the Eleventh Amendment as a matter of Federal law" (p. 578).

Further along in the opinion the Judge stated that:

> "Surprisingly, the defendant asserts that to stress the test of whether a judgment against the Authority would come from State funds is a 'narrow and archaic definition' of what is the State, which 'would take us back a hundred years.' It argues that precisely because the State has found it desirable to establish a separate body in order to

> obtain independent financing, this Court should extend immunity to that agency.
>
> "On the contrary, it is the defendant who is swimming against the prevailing tide of decisions and scholarly comment, all of which point to a functional analysis of the interests underlying the application of 'sovereign immunity' to new and different situations" (p. 579).

After quoting extensively from Chief Justice Vanderbilt's opinions on the subject, he concluded with the following sentences:

> "Immunity under the Eleventh Amendment is an attribute of the state only in its corporate sovereign capacity; if our complex society necessitates delegation of certain tasks to independent agents for the state, the rationale of the Amendment does not dictate its extension to them as well. It may be, as the defendant Authority claims, that it ranks *just* below the State itself in the hierarchy of New Jersey's political system; for our purposes, 'just below is far enough.'"

This principle applies *a fortiori* to our case because (a) E.D.A.'s functions are not governmental but proprietary; and (b) because the Commonwealth Government could not have lawfully created E.D.A. as a new department of the Government, absent specific enabling legislation by the Congress of the United States. (See E.D.A. brief in Court of Appeals, footnote, page 19.)

2. There is Diversity of Citizenship.

The plaintiff in this case has contended that the proprietary activities of E.D.A. deprive it of any right to sovereign immunity. This issue was argued fully in the courts below, but the Court of Appeals found it unnecessary to discuss the issue. The Court of Appeals held, however, that even if Puerto Rico or any state or state agency has waived its immunity by engaging

in commercial-type activities, "it cannot waive its lack of status as a citizen for the purpose of diversity jurisdiction." If that statement is allowed to stand, every non-federal question suit against a state as "the real party in interest" must be brought in state courts, no matter how clearly it has been deprived of sovereign immunity. Petitioner does not believe that the Congress in enacting the diversity jurisdiction of the District Courts, or that the Courts, in steadily narrowing the range of the doctrine of sovereign immunity, intended to bring about such an anomalous result. Diversity jurisdiction, despite opposition, maintains its place in the Federal Courts. It is supported by a continuing sentiment that a citizen of one state, when suing in another state, is entitled to have his case heard by judges independent from the state of his opponent's residence. Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction,* 46 A.B.A.J. 959 (September, 1960). If this sentiment has validity in litigation between private parties, it has perforce greater validity when the opponent is the state itself.

A. Confusion in the Courts on Sovereign Immunity. The confusion in the field of sovereign immunity is well illustrated by the cases involving the Pennsylvania Turnpike Commission. In *Gerr v. Emrich,* 283 F. 2d 293 (3rd Cir. 1960), cert. den. 365 U. S. 817 (1961), the U. S. Court of Appeals for the Third Circuit held the Turnpike Commission subject to suit by a citizen of another state, but in *Rader v. Pa. Turnpike Commission,* 407 Pa. 609, 182 A. 2d 199 (1962), the Supreme Court of Pennsylvania, over a strong dissent by Mr. Justice Musmanno, held the same Commission immune in an action by a resident of Pennsylvania. The opinion of the District Court in this case also demonstrates the confusion on the subject of sovereign immunity. The Court evidently

felt that E.D.A., as the *"alter ego"* of the Commonwealth, was immune to suit in any court, although it was engaging in a number of activities, such as the promotion of tourism and business expansion and the sale of rum, that have been held in other cases to constitute "proprietary" functions. See *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964); *Caporossi v. Atlantic City* (D.C.N.J. 1963), 220 F. Supp. 508, aff'd 328 F. 2d 620 (3rd Cir. 1964), cert. den. 379 U. S. 825; *Victory Transport, Inc., v. Comisaria General,* 336 F. 2d 354 (2nd Cir. 1964), cert. den. 381 U. S. 934 (1965); *Harris & Company Advertising, Inc., v. Republic of Cuba,* 127 So. 2d 687 (Dist. Ct. of Appeals, Florida [1961]); *Dormitory Authority v. Span Electric Co.*, 18 N. Y. 2d 114 (Ct. App. 1966); *Pantess v. Saratoga Springs Authority,* 255 App. Div. 426 (1st Dept. 1938); *Standard Oil of New Jersey v. U. S., et al.,* 25 F. 2d 480 (D. Ct. S. D. Ala., 1928); *People v. Sup. Court of San Francisco,* 178 P. 2d 1 (Sup. Ct. Cal. 1947); *Muses v. Housing Authority,* 189 P. 2d 305 (Sup. Ct. Cal. 1948).

B. Prior Decisions in This Court. The Court below quoted from *Postal Telegraph & Cable Co. v. Alabama,* 155 U. S. 482, decided in 1894, to the effect that "a state is not a citizen" in the context of diversity jurisdiction. That case, however, differs from this because there the state involved was the plaintiff, and it was *acting as the state* in a governmental function.* The Court was not dealing with a situation where the state had stepped out of its "governmental" role and had thereby waived any claim of immunity. This distinction warrants the speculation that this Court would have limited the holding to the actual facts, leaving undecided the question whether a state can be a "citizen"

* Likewise the case of *California ex rel. McColgan v. Bruce,* 129 F. 2d 42 (9 Cir. 1942), is readily distinguishable because there the state involved was the plaintiff and it was acting as the state in a governmental function—the collection of income taxes.

if it is not acting in its sovereign capacity. In applying the ancient aphorism that "the King can do no wrong," we have been admonished that he must be "acting as the King" before the immunity can be claimed. See *Elgin v. District of Columbia,* 337 F. 2d 152 (D. C. Cir. 1964). This Court, shortly after the adoption of the Eleventh Amendment, said the same, in effect, stating that there is no immunity when "a state becomes a partner in a trading company," as in the case *Bank of United States v. Planters Bank of Georgia,* 22 U. S. 904; *New York v. United States,* 326 U. S. 572, and to the same effect see *Southern Ry. Co. v. North Carolina,* 81 Fed. 595, 599, 600 (C.C.N.C., 1897). *State Highway Comm. v. Utah Construction Co.,* 278 U. S. 194 (1929), relied on the *Postal Telegraph* decision, and held that the Highway Commission of Utah could not be sued in a diversity action involving a dispute arising out of a road building contract —unquestionably a governmental function. The state in that case had expressly sought to retain immunity for its State Highway Commission from suit in Federal Courts. To the extent, however, that the opinion of Mr. Justice McReynolds indicates that a state can never be the subject of a diversity of citizenship action, the petitioner urges reconsideration of the subject in the light of the conflict in principle created by the decision in this case and the decisions in *Gerr v. Emrick.* See also *Dept. of Highways of La. v. Morse Brose., Inc.,* 211 F. 2d 140 (5th Cir. 1954); and the *Louisiana Highway Com. v. Farnsworth,* 74 F. 2d 910 (5th Cir. 1935).

C. The Role of Diversity Jurisdiction. Since diversity jurisdiction is part of our jurisprudence its scope should permit a citizen of one state, in proper cases, to sue an agency of another state; to insure that "The Citizens of each State" should be accorded "all Privileges and Immunities of Citizens in the several States";

to insure fair and impartial adjudication of controversies between a citizen of one state and of another state, unaffected by local prejudice, or political or local pressures; to discharge the duty of the National Government to provide a judicial system for the adjudication of claims arising out of controversies between citizens of different states—such as the case at bar—a system that would insure exact, equal, impartial and certain justice under law, administered with fairness, efficiency and expedition. See Phillips and Christenson, *The Historical and Legal Background of the Diversity Jurisdiction,* 46 A.B.A.J. 959, 965 (Sept. 1960).

D. State Citizenship Should be Attributed to EDA. Petitioner urges the Court to adopt a more flexible test for citizenship, more like the approach of the Court of Appeals for the Second Circuit in its opinion in *Mason v. American Express Company,* 334 F. 2d 392 (2nd Cir. 1964), in holding that an unincorporated joint stock association may be deemed a citizen of the State of its organization for purposes of diversity of citizenship jurisdiction.

To take the restrictive view of the Court below in this case, relying on the theory of the *Utah Construction* case, namely, that a State agency, regardless of its activities, may be the *"alter ego"* of the State and therefore not subject to diversity jurisdiction, is to adopt a blind mechanical and artificial test without regard to a determination and consideration of the purposes, functions and powers for which the agency or instrumentality was established, and the nature of its activities, namely, whether "governmental" or "proprietary." It disregards the extent to which a state has divested itself of its sovereignty and taken on the character of a private trader, at least so far as diversity jurisdiction is concerned.

The Court below virtually adopted the view that any state agency or instrumentality is necessarily the State, regardless of its activities and the purposes and the functions for which it was created, and therefore determined that it has no status as a citizen for diversity purposes. This flies in the face of the fact that states are today creating all kinds of instrumentalities and agencies which are performing functions heretofore performed by private industry and never contemplated or considered as State functions when the diversity statute was enacted, nor for that matter, by the framers of the Eleventh Amendment. Cf. *Victory Transport v. Comisaria,* 336 F. 2d 354 (*supra*).

3. The "Alter Ego" Test Used by the Lower Courts in Deciding Whether EDA is a "Citizen" of the Commonwealth is Too Vague, Breeds Confusion, and Subverts the Policy of the Diversity Statute

This case involves strictly the limited question whether an autonomous agency, which carries on nongovernmental functions, is a "citizen" under the diversity statute. The courts below have applied a judicial test in an important area of federal jurisdiction which is so amorphous as to breed confusion in application, and to defeat a primary object for which the diversity statute was enacted.

The neutral facts on which the District Court based its conclusion that E.D.A. is not a "citizen" within the diversity of citizenship jurisdiction of the United States District Courts were not in dispute. The predicate for the lower court's conclusion that E.D.A. is not a "citizen" was that E.D.A., though autonomous and engaged in proprietary functions, is the *"alter ego"* of the Commonwealth. One of the pillars on which the District Court reached this conclusion was its belief that the functions entrusted to E.D.A. were "governmental" and

not, as we contend (and as the Court of Appeals assumed *arguendo* to be correct), ordinary business, or non-governmental functions. The Court of Appeals, however, noting our position said:

> "A state may, in its own name or through an *alter ego*, carry on activities which are traditionally regarded as proprietary functions but neither the state nor its *alter ego* thereby becomes a citizen for the purpose of diversity jurisdiction" (386 F. 2d at 181).

The concept of an *"alter ego"* in this context breeds confusion in the administration of the diversity statute because the factors which the Courts take into account, are directed to whether an agency of the state is acting for the public welfare and is the real party in interest. But in application this standard is very vague. Everything that a state government does, either through its own employees or indirectly through a public corporation, board, or agency is intended to promote the public welfare, even if, e. g., the state creates an agency to sell liquor in package stores, or to bottle and sell spring water. In short, every state agency is doing the state's work, and thus is acting in the interest of the state and serving the public welfare.

Since the "citizen" status of a state agency is a matter for the ultimate decision by the Federal Courts, they are in a position to lay down a judicial standard requiring an agency to be deemed "a citizen" when the functions entrusted to that agency are commercial and not governmental.

The adoption of such a test would help to eliminate the morass of confusion now prevailing in this field, and would serve the interest of justice. Those who deal with such agencies as a matter of fairness and justice have the right to know whether the agency is im-

mune from suit in the Federal Courts. Cf. *North Dakota v. National Milling & Cereal Co., Inc.*, 114 F. 2d 777, 779, 780 (8 Cir. 1940).

4. EDA Should be Suable in the Federal Courts.

E.D.A. has seven offices in the United States other than its principal office in San Juan as well as offices in foreign countries. It does business with businessmen and firms, if not in fifty states, in a great number of them, by soliciting firms and corporations to locate and build plants, factories and businesses in Puerto Rico; so that together with its other business activities it is a vast advertising agency.

A refusal to treat it as a "citizen" of the State would entirely bar it from access, as either plaintiff or defendant, to the Federal Courts when Federal jurisdiction is based on diversity of citizenship. Cf. *Mason v. American Express Company*, 334 F. 2d 392, 402 (Cir. 2d 1964).

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Relevant Constitutional and Statutory Provisions.

Amendment XI—United States Constitution

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. Sec. 1332:

"Diversity of Citizenship * * *.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

* * *

"(d) The word 'States,' as used in this section includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

APPENDIX B.

Opinions in the Courts Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 131—September Term, 1967.

(Argued October 23, 1967 Decided December 6, 1967.)

Docket No. 30980

MAURICE A. KRISEL,

Plaintiff-Appellant,

—v.—

RAFAEL DURAN, SAM VAN HINING and PHILLIPS PETROLEUM COMPANY,

Defendants,

—and—

ECONOMIC DEVELOPMENT ADMINISTRATION OF PUERTO RICO,

Defendant-Appellee.

Before:

FRIENDLY, KAUFMAN and ANDERSON,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge*, dismissing the complaint for lack of jurisdiction as to the Economic Development Administration of Puerto Rico. Affirmed.

MICHAEL H. CARDOZO, IV, Esq. and ROMAN BECK, Esq., New York, N. Y. (Cardozo & Cardozo, Benjamin M. Cardozo, Esq., Maurice A. Krisel, Esq. and Edwin D. Kyle, Esq., New York, N. Y. on the brief), *for Plaintiff-Appellant.*

WILLIAM D. ROGERS, Esq., Washington, D. C. (Jose C. Aponte, Attorney General, Commonwealth of Puerto Rico; John T. Rigby, Esq., of Arnold & Porter, Washington, D. C.; Robert A. Bicks, Esq., of Breed, Abbott & Morgan, New York, N. Y. on the brief), *for Defendant-Appellee.*

PER CURIAM:

The facts are fully recited in Judge Weinfeld's very comprehensive opinion reported in 258 F. Supp. 845 (S. D. N. Y. 1966) and will only be mentioned in essential outline here. In his complaint, brought against Economic Development Administration of Puerto Rico (EDA), two of its officials and Phillips Petroleum Company, the plaintiff-appellant alleged that he had created a novel idea which he communicated to EDA on its promise not to disclose and that EDA and the other defendants had breached that promise. The sole issue on appeal is whether there was diversity of citizenship between the plaintiff, a citizen of the State of New York and EDA.

EDA was created in 1950 as an agency of the Commonwealth of Puerto Rico[1] to engage in economic research, encourage and develop industrial growth and promote tourism. It was not incorporated, nor could it sue or be sued.

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1 Reorganization Plan No. 10 under Laws of Puerto Rico Title 23, §231.

Its only source of revenue was from annual appropriations by the legislature of the Commonwealth to which it submitted its budget. Prior to 1950 the functions of EDA were, with other pursuits, performed by the Puerto Rico Industrial Development Co. (PRIDCO), a public corporation which had power to make contracts, sue and be sued, and participate in various commercial and industrial enterprises which it continued after that date. In granting EDA's motion to dismiss for lack of jurisdiction, the district court concluded, after considering the intent and purpose of the Puerto Rico Legislature in enacting the applicable statutes, the history of EDA and evidence of its establishment and operation, that in all respects "EDA was acting as the agency and alter ego of the Commonwealth and that the Commonwealth is the real party in interest," and that there was, therefore, no diversity.

The appellant argues that when a state[2] engages in activities that divest it of sovereign immunity, it becomes a citizen of that state for diversity purposes; and that EDA was directly, and through its control over PRIDCO indirectly, engaged in ordinary business or non-governmental functions and was not entitled to sovereign immunity. He relies upon *Gerr* v. *Emrick*, 283 F. 2d 293 (3 Cir. 1960), cert. denied 365 U. S. 817 (1961), a suit by a citizen of Connecticut against the Pennsylvania Turnpike Commission for negligence, but the *Gerr* case held specifically that the Commission was not the alter ego of the State, that it had the status of a municipal corporation and was therefore a citizen of the State for purposes of diversity, and that "a suit against the Commission is not a suit against the Commonwealth."

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2 28 U. S. C. §1332(d) equates Puerto Rico, for purposes of the diversity statute, with the "States." *Lummus Co.* v. *Commonwealth Oil Refin. Co.*, 195 F. Supp. 47 (S. D. N. Y. 1961).

"A state is not [itself] a citizen" and a suit "between a state and a citizen . . . of another state is not between citizens of different states . . . ." *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 487 (1894). It is immaterial whether the state engages in activities in its own name or through an "arm" or "alter ego." For the purpose of diversity jurisdiction, the determinative factor is whether the state is the real party in interest. *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278 U. S. 194, 199-200 (1929); *DeLong Corp.* v. *Oregon State Highway Comm'n*, 233 F. Supp. 7, 10 (D. Ore. 1964), *aff'd*, 343 F. 2d 911 (9 Cir.), *cert. denied* 382 U. S. 877 (1965).

The issue of whether or not the instrumentality of a state is a citizen of that state for diversity purposes is separate and distinct from the issue of sovereign immunity. A state may waive its sovereign immunity but it cannot waive its lack of status as a citizen for the purpose of diversity jurisdiction under Title 28 U. S. C. §1332. "No consent by the State to submit itself to suit could affect the question of diverse citizenship." *State Highway Commission of Wyoming* v. *Utah Construction Co., supra.* See *California ex rel. McColgan* v. *Bruce*, 129 F. 2d 421 (9 Cir.), *cert. denied*, 317 U. S. 678 (1942). A state may, in its own name or through an alter ego, carry on activities which are traditionally regarded as proprietary functions but neither the state nor its alter ego thereby becomes a citizen for the purpose of diversity jurisdiction. *State Highway Commission of Wyoming* v. *Utah Construction Co., supra; North Dakota* v. *National Milling & Cereal Co., Inc.*, 114 F. 2d 777, 779 (8 Cir. 1940).[3]

The judgment of the District Court is affirmed.

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3 We do not understand Mr. Justice Reed's language in *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 49 (1944) to be to the contrary. The Court in that case addressed itself to the question of the State's sovereign immunity rather than status under the diversity statute. *Id.* at 53-54.

(944)

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAURICE A. KRISEL,

Plaintiff,

against

RAFAEL DURAN, SAM J. VAN HINING, ECONMIC DEVELOPMENT ADMINISTRATION OF PUERTO RICO and PHILLIPS PETROLEUM COMPANY,

Defendants.

Appearances:

Cardozo & Cardozo, Esqs., 342 Madison Avenue, New York, New York, Attorneys for Plaintiff.

Benjamin M. Cardozo, Esq., Edwin D. Kyle, Esq., of Counsel.

Hon. Rafael Hernandez Colon, Attorney General, Commonwealth of Puerto Rico.

Arnold & Porter, Esqs., 1229 Nineteenth Street, N. W. Washington, D. C.

William D. Rogers, Esq., John T. Rigby, Esq., of Counsel.

(945) Breed, Abbott & Morgan, Esqs., One Chase Manhattan Plaza New York, New York

Robert A. Bicks, Esq., Of Counsel, Attorneys for the Commonwealth of Puerto Rico.

Sullivan & Cromwell, Esqs., 48 Wall Street, New York, New York, Attorneys for Phillips Petroleum Company.

Robert MacCrate, Esq., Thomas E. Patton, Esq., Of Counsel.

Opinion

(946) EDWARD WEINFELD, D. J.:

Plaintiff by this action seeks thirty million dollars damages, injunctive relief, an accounting and to impress a trust. The defendants are the Economic Development Administration of Puerto Rico (EDA), its administrator, Rafael Durand, its economic consultant, Sam J. Van Hyning,[1] and Philips Petroleum Company (Phillips).

The essence of plaintiff's claim is that he conceived a novel and original program for the development of a petro-chemical plant in Puerto Rico and for obtaining a substantial oil import quota therefor; that it was revealed in trust and confidence to the defendants Durand and Van Hyning, as officials of EDA, upon an agreement of nondisclosure; that in breach thereof they and EDA disclosed the program to Phillips; that the defendants wrongfully appropriated plaintiff's (947) program when Phillips undertook its development under an agreement whereby EDA is to share in its profits and benefits.

The defendant EDA moves to dismiss the complaint on various grounds which, in the main, rest upon its contention that it is an agency of the government of the Commonwealth of Puerto Rico, and as such enjoys sovereign immunity and is not subject to diversity jurisdiction. It moves to dismiss under:

> (a) Rule 12(b) (1) of the Federal Rules of Civil Procedure for lack of jurisdiction over the subject matter based upon nondiversity of citizenship;[2]
>
> (b) Rule 12(b) (2) for lack of jurisdiction over the person, since it has not consented to be sued;

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[1] The individual defendants have not been served with process. Plaintiff, in captioning his complaint, has misspelled the names of both individual defendants. Their names are properly spelled in the text of this opinion.

[2] Subject matter jurisdiction embraces diversity of citizenship as well as the required jurisdictional amount. *Page v. Wright*, 116 F. 2d 449, 454 (7th Cir. 1940), appeal dismissed 312 U. S. 710 (1941); *Clemente Engineering Co. v. DeLiso Constr. Co.*, 53 F. Supp. 434 (D. Conn. 1944).

(948) (c) Rule 12(b) (5) for insufficient service of process on the ground that as a "state"[3] or "governmental organization" it was not served with process as required under Rule 4(d) (6).

EDA also moves under Rule 12(b) (6) to dismiss the complaint for failure to state a claim, or in the alternative for summary judgment pursuant to Rule 56. Phillips also moves (by way of cross-motion) for summary judgment. On this aspect of the motion the parties have submitted affidavits, including the deposition of the plaintiff and exhibits. Phillips' cross-motion was made in response to plaintiff's motion (949), directed to its answer.

I

We first consider the motion of the defendant EDA. Federal jurisdiction is alleged upon diversity of citizenship.[4] Plaintiff is a citizen of the State of New York. The complaint, as amended, alleges that EDA is a body corporate organized under the laws of the Commonwealth of Puerto Rico, with its principal place of business in San Juan, Puerto Rico, and is a citizen of Puerto Rico. Phillips is alleged to be a Delaware corporation engaged in business within this district, with its principal place of business in the State of Oklahoma.

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[3] Whatever the true political nature of the Commonwealth, it possesses the sovereign immunity of a state, see *Puerto Rico v. Shell Co.*, 302 U. S. 253, 262 (1937); *Porto Rico v. Rosaly y Castillo*, 227 U. S. 270, 274 (1913), and the parties appear in agreement that for the purposes of this suit it may be deemed a state. For a discussion of the Commonwealth's status and characteristics, see Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1 (1953). See also *Moreno Rios v. United States*, 256 F. 2d 68, 71-72 (1st Cir. 1958); *Figueroa v. Puerto Rico*, 232 F. 2d 615, 616-19 (1st Cir. 1956); *Arbona v. Kenton*, 126 F. Supp. 366 (S.D.N.Y. 1954).

[4] See 28 U.S.C. §1332. Under the diversity statute, Puerto Rico is a state. See §1332(d); *Lummus Co. v. Commonwealth Oil Refining Co.*, 195 F. Supp. 47, 48-51 (S.D.N.Y. 1961).

EDA challenges federal diversity jurisdiction on the ground that it is not a citizen of Puerto Rico but in fact is the "arm or *alter ego*"[5] of the (950) Commonwealth of Puerto Rico, which is the real party in interest, and that since diversity jurisdiction does not extend to controversies between a state and a citizen of another state, the action must fail.[6] As plaintiff concedes, "either the defendant EDA is a 'citizen' within the meaning of § 1332, or the Court lacks diversity jurisdiction over EDA." While the issue of diversity jurisdiction is separate from that of sovereign immunity,[7] as a practical matter the fact determination of whether the EDA is the agency of the Commonwealth resolves both issues.

The pleadings do not control; the fact that the complaint names EDA as a defendant does not preclude (951) inquiry to ascertain who in fact is the real party in interest in order to determine whether diversity jurisdiction exists. The issue is to be determined by the essential nature and effect of the suit as disclosed by the entire record,[8] and if it appears that the Commonwealth is the real, substantial party against whom the claim is asserted, the jurisdictional, attack based upon the plea of sovereign immu-

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[5] *State Highway Comm'n v. Utah Constr. Co.*, 278 U. S. 194, 199 (1929).

[6] See *id.* at 199-200; *O'Neill v. Early*, 208 F. 2d 286, 289 (4th Cir. 1953); *Broadwater-Missouri Water Users' Ass'n v. Montana Power Co.*, 139 F. 2d 998, 999 (9th Cir. 1944); *North Dakota v. National Milling & Cereal Co.*, 114 F. 2d 777, 779 (8th Cir. 1940).

[7] See *State Highway Comm'n v. Utah Constr. Co.*, 278 U. S. 194, 199-200 (1929); *North Dakota v. National Milling & Cereal Co.*, 114 F. 2d 777, 779 (8th Cir. 1940); *DeLong Corp. v. Oregon State Highway Comm'n*, 233 F. Supp. 7, 10 (D. Ore. 1964), aff'd 343 F. 2d 911 (9th Cir.), cert. denied 382 U. S. 877 (1965); *Weyerhaeuser Co. v. State Roads Comm'n*, 187 F. Supp. 766, 770-71 (D. Md. 1960).

[8] *In re Ayers*, 123 U. S. 443, 492 (1887); *Harrison Constr. Co. v. Ohio Turnpike Comm'n*, 272 F. 2d 337, 339 (6th Cir. 1959); *Weyerhaeuser Co. v. State Roads Comm'n*, 187 F. Supp. 766, 771 (D. Md. 1960); *First Nat'l Benefit Soc'y v. Garrison*, 58 F. Supp. 972, 990-91 (S.D. Cal. 1945), aff'd 155 F. 2d 522 (9th Cir. 1946).

nity must be upheld even though the Commonwealth is not specifically named as a defendant.[9]

Since the issue is one of federal jurisdiction, (952) governed by the legislation which defines the status of Puerto Rico[10] and the diversity statute, federal law controls.[11] However, local law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance.[12]

Among the other factors, no one of which is conclusive,[13] perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state (953) treasury;[14] significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental

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[9] See *Ford Motor Co. v. Department of Treasury*, 323 U. S. 459, 464 (1945); *Ex parte State of New York*, No. 1, 256 U. S. 490, 500 (1921); *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 642 (1911); *Ex parte Nebraska*, 209 U. S. 436, 445 (1908); *People ex rel. McColgan v. Bruce*, 129 F. 2d 421, 423 (9th Cir.), cert. denied 317 U. S. 678 (1942); *DeLong Corp. v. Oregon State Highway Comm'n*, 233 F. Supp. 7, 10 (D. Ore. 1964), aff'd 343 F. 2d 911 (9th Cir.), cert. denied 382 U. S. 877 (1965).

[10] See Organic Act of Puerto Rico, 39 Stat. 951 (1917), as amended, 48 U.S.C. §§731-916. Cf. *Porto Rico v. Rosaly y Castillo*, 227 U. S. 270 (1913).

[11] Cf. *Board of Supervisors v. Ludley*, 252 F. 2d 372, 375-76 (5th Cir.), cert. denied 358 U. S. 819 (1958), and cert. denied *sub nom. Louisiana State Bd. of Educ. v. Lark*, 358 U. S. 820 (1958); *DeLong Corp. v. Oregon State Highway Comm'n*, 233 F. Supp. 7, 10 (D. Ore. 1964), aff'd 343 F. 2d 911 (9th Cir.), cert. denied 382 U. S. 877 (1965); *Fleming v. Upper Dublin Pub. School Dist.*, 141 F. Supp. 813 (E.D. Pa. 1956).

[12] See cases cited in note 11, *supra*.

[13] See *Pennsylvania Turnpike Comm'n v. Welsh*, 188 F. 2d 447, 450 (3d Cir. 1951).

[14] See *Ford Motor Co. v. Department of Treasury*, 323 U. S. 459, 464 (1945); *State Highway Comm'n v. Utah Constr. Co.*, 278 U. S. 194, 199 (1929); *O'Neill v. Early*, 208 F. 2d 286, 288 (4th Cir. 1953); *Cook v. Davis*, 178 F. 2d 595, 599 (5th Cir.), cert. denied 340 U. S. 811 (1950); *Fowler v. California Toll-Bridge Authority*, 128 F. 2d 549 (9th Cir. 1942); *Sehlmeyer v. Romco Co.*, 117 F. 2d 996, 998 (9th Cir. 1941). Compare *Miller v. Vermont*, 201 F. Supp. 930, 932-33 (D. Vt. 1962).

or proprietary function;[15] whether it has been separately incorporated;[16] the degree of autonomy over its (954) operations,[17] whether it has the power to sue and be sued[18] and to enter into contracts;[19] whether its property is immune from state taxation,[20] and whether the sovereign has immunized itself from responsibility for the agency's operations.[21]

Before analyzing the nature, structure and functions of EDA, it is desirable that the underlying purpose which brought it into being be considered. In the 1940's Puerto Rico's economic life was geared principally to sugar production and distribution—essentially its economy was agrarian. In an effort to (955) expand and to diversify its economy, and to increase employment—all to raise the standard of living of its citizens—the government instituted a vast program of industrial and economic development. Tax benefits, financial assistance in plant construction and other incentives were offered to potential invest-

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[15] See *Kansas Turnpike Authority v. Abramson*, 275 F. 2d 711, 713 (10th Cir.), cert. denied 363 U. S. 813 (1960); *United States v. Fuston*, 143 F. 2d 76, 78 (10th Cir.), cert. denied 323 U. S. 768 (1944); *Fowler v. California Toll-Bridge Authority*, 128 F. 2d 549 (9th Cir. 1942); *Sehlmeyer v. Romeo Co.*, 117 F. 2d 996, 998 (9th Cir. 1941); *DeScala v. Panama Canal Co.*, 222 F. Supp. 931, 932 (S.D.N.Y. 1963).

[16] See *United States v. Edgerton & Sons*, 178 F. 2d 763, 764 (2d Cir. 1949); *United States Department of Agriculture v. Hunter*, 171 F. 2d 793, 795 (5th Cir. 1949); *DeScala v. Panama Canal Co.*, 222 F. Supp. 931, 932-33 (S.D.N.Y. 1963). But see *Hunkin-Conkey Constr. Co. v. Pennsylvania Turnpike Comm'n*, 34 F. Supp. 26, 28-29 (M.D. Pa. 1940).

[17] See *Aerated Prods. Co. v. Department of Health*, 59 F. Supp. 652, 660 (D. N. J. 1945), aff'd 159 F. 2d 851, 853-54 (3d Cir. 1947).

[18] See *United States Department of Agriculture v. Hunter*, 171 F. 2d 793, 795 (5th Cir. 1949); *DeScala v. Panama Canal Co.*, 222 F. Supp. 931, 932-33 (S.D.N.Y. 1963).

[19] See *Cowles v. Mercer County*, 74 U. S. 118, 122 (1868).

[20] See *Pennsylvania Turnpike Comm'n v. Welsh*, 188 F. 2d 447, 450 (3d Cir. 1951).

[21] See *Harrison Constr. Co. v. Ohio Turnpike Comm'n*, 272 F. 2d 337, 339 (6th Cir. 1959); *Pennsylvania Turnpike Comm'n v. Welsh*, 188 F. 2d 447, 450 (3d Cir. 1951).

ors; offices were maintained in the United States and Canada to publicize the advantages and opportunities available to investors in Puerto Rico and to attract risk capital.

The program had marked sucess in the two decades of its existenee. It is stated that new industrial plants are being established at an average rate of 250 per year and that the economy, now widely diversified, enjoys one of the highest rates of annual income growth in the world—some ten per cent.

Prior to 1950 the vehicle used by the Commonwealth to carry out the program of industrial and economic development, sometimes referred to as "Operation Bootstrap," was a public corporation, the Puerto Rico Industrial Development Company (PRIDCO). Its activities were two-gauged, one operational and (956) the other promotional. In 1950 the promotional aspects of the program were transferred to EDA. The origin of the transfer and the details with respect to the differences in functions and duties of the two agencies are discussed hereafter, since they bear significantly on the issue of sovereign immunity.

Since the 1950's petroleum refineries and related petrochemical production and processes have been a critical part of Puerto Rico's economic development program. Its importance to Puerto Rico's industrial and economic growth, to compensate for the island's scarcity of materials, has long been recognized. An essential of petrochemical production is oil feed stock for refining, the derivatives of which are fed into related petro-chemical and chemical plants for ultimate processing into synthetic fibers, plastics and other consumer products, marketable in Puerto Rico and abroad. In end result product diversification, industrial expansion, increased employment and improved housing are achieved: Because of proximity and cost factors, Venezuela has been the principal source of the required oil feed stock.

(957) However, in March 1959, the importation into Puerto Rico and the United States of crude oil and crude oil derivatives, the feed stock essential for petro-chemical processes, was restricted by proclamation of the President of the United States.[22] Quotas for the importation of oil were granted by the United States Secretary of Interior on a sliding scale according to the refinery imput to those who at the effective date of the mandatory program operated refineries or had histories of oil importation.[23] When the restrictive order became effective, two oil companies had already been in operation in Puerto Rico and they, as well as nonrefinery operators, had with Commonwealth support, obtained quotas for the importation of oil. (958) The instant suit centers about plaintiff's submission in September 1961 to EDA of a proposal for a petro-chemical complex which contemplated the erection of a refinery for processing and petro-chemical plants, together with a plan which he asserts he conceived for a modification of oil import quota restrictions in order to obtain the essential crude oil. The proposal was hinged to the importation into Puerto Rico from Venezuela of 35-40,000 barrels of crude oil per day for the first two-three years and ultimately of 70,000 barrels per day.

While the Court at this point does not consider the merits of plaintiff's claim, he contends that his program was novel, original, and submitted to EDA in confidence; that he was the first to conceive a practical program for building a plant and obtaining the required oil feed stock. The essence of his claim of novelty, as his complaint (959) alleges, was utilizing the political power and prestige of the Commonwealth and its officials in support of the ap-

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[22] See Presidential Proclamation No. 3279, 24 Fed. Reg. 1781 (1959).

[23] See generally *Atlantic Refining Co. v. Standard Oil Co.*, 304 F. 2d 387 (D.C. Cir. 1962), which discusses various aspects of the oil import program and the reasons for its promulgation.

plication for the import quota of petroleum required for the proposed project.

His letter of September 25, 1961 to Rafael Durand, administrator of EDA, explicitly states that the program is "predicated on your government issuing to our enterprise a commitment that * * * the Commonwealth government will obtain a quota of foreign crude oil, preferably Venezuelan, for our use sufficient in barrelage per day to warrant our going ahead with our plans * * *. The project depends entirely on your obtaining the quota of oil required." Thus, whatever the merits of the plaintiff's basic claim, it is clear that the Commonwealth itself was to play the essential role under plaintiff's projected program. Durand, however, (960) on October 16, 1961, advised plaintiff that the Commonwealth would "not entertain a commitment to satisfy the * * * condition in your letter of September 25 to me."

Other groups as well as EDA have been interested in the development of a petro-chemical complex. Among these was the defendant Phillips, which since 1945 has operated one of the world's largest petro-chemical plants in Texas and which, after prior negotiations in January 1964, with the support of EDA and the Commonwealth, applied to the United States Department of the Interior for a quota of 50,000 barrels per day of selected petroleum feed stock to be imported into Puerto Rico for refinement and use in a contemplated chemical complex. After due notice a public hearing was held on the Phillips application in July 1964. On February 11, 1965 the Secretary of (961) the Interior announced he favored the establishment of a major petro-chemical complex in Puerto Rico and that his department would enter into final negotiations with Phillips to determine the feasibility of a project to yield "maximum economic benefits and maximum employment opportunities for Puerto Rico." Within a week of this announcement, on February 18, plaintiff wrote Phillips con-

tending that the plan so tentatively approved by the Department of the Interior was the very one he had proposed and disclosed in confidence to EDA officials in 1961, and that he planned legal action against Phillips and others for alleged appropriation of his property.[24]

On May 14, 1965 the Department of the Interior gave final approval to the Phillips plan, following which, on May 27, 1965, Phillips and the Commonwealth of Puerto Rico entered into an agreement embodying the plan. (962) Against this broad outline of the nature of plaintiff's claim as alleged against EDA, we now analyze the legislation which created it, its structure and relationship to the Commonwealth, and other factors which bear on the issue of who is the real, substantial party in interest against whom the claim is asserted.

EDA was created under Reorganization Plan No. 10 of 1950, and by implementing legislation was "organized to operate as an agency of the Government of Puerto Rico * * *."[25] Its principal functions are economic research, industrial promotion and the promotion of tourism —functions previously performed by the Puerto Rico Industrial Development Company (PRIDCO), a public corporation. EDA's affairs are directed by an administrator appointed by the Governor, with the advice and consent of the Senate.[26] Despite plaintiff's allegation that it is a "body corporate," (963) EDA is not incorporated, nor does it have power to sue or be sued, as is also alleged. EDA is not authorized to issue bonds and has no means of obtaining revenue except through annual appropriations by the Legislature. Like any other Commonwealth agency,

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[24] Phillips' denial of plaintiff's charges and its position with respect thereto is considered under its cross-motion for summary judgment.

[25] Laws of Puerto Rico Ann. tit. 23, §231.

[26] Reorganization Plan No. 10 of 1950, §1.

it must submit an annual budget to the Legislature.[27] Although in connection with its commercial and industrial activities EDA's funds are disbursed in the manner customary in private industry,[28] from which plaintiff concludes EDA is more like a private than a governmental entity, this is only one aspect of the management of its funds. All funds are "covered into the Treasury of Puerto Rico, and * * * deposited with recognized depositaries for the funds of the Commonwealth Government * * *.";[29] its accounting system was established by the Secretary of the Treasury, and its accounts are audited by the Controller at least once a year.[30] EDA's property is controlled by the (964) Secretary of the Treasury to the same extent that he usually exercises control over the property of the "regular departments and agencies of the * * * Commonwealth,"[31] and all of its "equipment, supplies and everything necessary to carry out * * * [its] functions" are purchased by the Administrative Procurement Unit of the Treasury Department or with the approval of the Secretary of the Treasury;[32] the purchase, sale, maintenance, in fact "everything in connection with * * * [its] motor vehicles," are subject to the control and authority of the Office of Transportation of the Commonwealth Government.[33]

Notwithstanding these rather compelling factors which strongly support EDA's position that in fact it is the arm of the Commonwealth, the plaintiff contends that countervailing considerations establish that it functions as an

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[27] Laws of Puerto Rico Ann. tit. 23, §233.

[28] Laws of Puerto Rico Ann. tit. 23, §235.

[29] Laws of Puerto Rico Ann. tit. 23, §236.

[30] Laws of Puerto Rico Ann. tit. 23, §237.

[31] Laws of Puerto Rico Ann. tit. 23, §238.

[32] Laws of Puerto Rico Ann. tit. 23, §234.

[33] Laws of Puerto Rico Ann. tit. 23, §239.

independent agency. The (965) principal thrust of his argument centers about PRIDCO, which was organized in 1942 by the Puerto Rico Legislature as a public corporation to induce private capital to undertake and develop various commercial and industrial enterprises. It was given the power to contract and to sue and be sued. Plaintiff contends that PRIDCO had and continues to have the status of an agency entirely separate and independent of the Commonwealth; that when EDA was created in 1950 it was as the successor to PRIDCO, and as such succeeded to PRIDCO's status, emphasizing that PRIDCO itself was transferred to EDA and placed under the direction of the administrator of EDA. It may be acknowledged that PRIDCO was entirely independent of the government of Puerto Rico and as much was conceded upon the argument of this motion. But plaintiff's conclusion that EDA succeeded to PRIDCO's status misreads the statute which gave birth to EDA upon legislative acceptance of the Reorganization Plan of 1950, and further disregards very fundamental differences in the structure, function and powers of the two agencies and in the relationship of each to the Commonwealth.

(966) EDA was created as a new "agency of the Government of Puerto Rico"[34] with a new status. Upon its organization it did not take over lock, stock and barrel all the functions previously performed by PRIDCO, and PRIDCO itself was not legislated out of existence. On the contrary, although subject to the control of the Economic Development Administration, PRIDCO's identity was expressly preserved as "a public corporation having legal existence and personality separate and apart from those of the Government,"[35] and it retained specified functions.

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[34] Laws of Puerto Rico Ann. tit. 23, §231.

[35] Laws of Puerto Rico Ann. tit. 23, §274.

Opinion

PRIDCO and EDA are separate and distinct bodies, each with separate and distinct functions. Prior to EDA's creation in 1950 PRIDCO's functions embraced governmental and proprietary activities. These extended to industrial development, economic research, the promotion of tourism, and the ownership, development, operation and leasing of industrial and (967) commercial plants. Some, but not all, of these functions were transferred to EDA. The latter took over only those of industrial development, economic research and the promotion of tourism. It is beyond serious challenge that those three functions are governmental and concern the welfare and well being of the Commonwealth and its citizens in economic, social, political and cultural aspects. On the other hand, PRIDCO continued to own, operate and manage factories; it also continued to buy, sell and lease properties—functions normally exercised by private enterprise. Since the functions which were transferred to EDA are of a nature normally associated with governmental bodies possessing sovereign immunity and particularly since the proprietary functions which would have militated against granting EDA immunity were not transferred, plaintiff's contention that EDA upon its creation automatically assumed the nonimmune, proprietary status of PRIDCO is without support.

What has been said so far as to the distinct and singular characteristics of EDA under the Act (968) establishing it also disposes of plaintiff's further contention that because the Puerto Rican Legislature normally creates agencies independent of the Commonwealth government, EDA must be deemed such an agency. Plaintiff here points to the Puerto Rico Water Resources Authority, the Puerto Rico Ports Authority, the Metropolitan Bus Authority, the Commercial Development Company, the Puerto Rico Communications Authority and the Caribbean Economic Development Corporation. If anything, reference to them

defeats rather than supports his position. Each of those agencies, like PRIDCO, but unlike EDA, is endowed by its governing statute with an entirely separate and independent status;[36] that EDA was not so endowed is indicative of a legislative purpose to differentiate (969) between its status and those of other agencies created to function independently of the government. This purpose is underscored since the Legislature, when it desired to confer independent status upon a governmental instrumentality, knew how to do so.

In sum, the legislation under which EDA was organized establishes that it has the attributes and restrictions of a traditional executive agency of government and is far from autonomous, and further that it is without funds of its own or authority to raise funds. Were a judgment to be recovered against it, the Commonwealth would be called upon for payment. Although plaintiff in his reply memorandum argues that he does not seek a money judgment against EDA but merely equitable relief against the stock interest in the new petro-chemical complex which will be granted to PRIDCO, the fact is that his complaint names EDA and not PRIDCO as a defendant, and further his complaint seeks not only equitable relief but damages as well. If plaintiff's suit should succeed as it is presently framed, any recovery will be against EDA, and since it is without funds, payment of the judgment, (970) if any, can only come from the Commonwealth govern-

[36] As to the Water Resources Authority, see Laws of Puerto Rico Ann. tit. 22, §193; as to the Ports Authority, see Laws of Puerto Rico Ann. tit. 23, §333; as to the Bus Authority, see Laws of Puerto Rico Ann. tit. 23, §603; as to the Commercial Development Company, see Laws of Puerto Rico Ann. tit. 23, §251c; as to the Communications Authority, see Laws of Puerto Rico Ann. tit. 27, §293; as to the Caribbean Economic Development Corporation, see Laws of Puerto Rico Ann. tit. 23, §261a.

ment—a factor of much significance.[37] Moreover, it clearly appears that the Puerto Rico Legislature intended to endow EDA with the Commonwealth's sovereign immunity. This last factor alone, however, is not conclusive since a state may not clothe a body, not otherwise entitled to sovereign immunity, with such exemption from suit for the purpose of defeating diversity jurisdiction or other federal rights.[38] Thus other factors remain to be considered.

Plaintiff, in a further effort to bolster his position that EDA is an agency entirely independent (971) of the Commonwealth, stresses that its methods of operation parallel those of private industry. He urges that even though EDA may not specifically be authorized by statute to enter into contracts or to sue or be sued, in fact and in practice it does enter into contracts under which it undertakes functions akin to those of private enterprise, and maintains offices in New York and other cities of the United States and Canada, where it solicits business; such activities, he contends, render EDA subject to suit. He relies heavily upon *Cowles v. Mercer County*,[39] where the Supreme Court said that "the power to contract with citizens of other States *implies* liability to suit by citizens of other States * * *."[40] However, the power to contract, taken alone, is not determinative, as many courts, including the

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[37] See *Ford Motor Co. v. Department of Treasury*, 323 U. S. 459, 464 (1945); *State Highway Comm'n v. Utah Constr. Co.*, 278 U. S. 194, 199 (1929); *O'Neill v. Early*, 208 F. 2d 286, 288 (4th Cir. 1953); *Cook v. Davis*, 178 F. 2d 595, 599 (5th Cir.), cert. denied 340 U. S. 811 (1950); *Fowler v. California Toll-Bridge Authority*, 128 F. 2d 549 (9th Cir. 1942); *Sehlmeyer v. Romeo Co.*, 117 F. 2d 996, 998 (9th Cir. 1941). Compare *Miller v. Vermont*, 201 F. Supp. 930, 932-33 (D. Vt. 1962).

[38] See *Cowles v. Mercer County*, 74 U. S. 118, 122 (1868); *Board of Supervisors v. Ludley*, 252 F. 2d 372, 376 (5th Cir.), cert. denied 358 U. S. 819 (1958), and cert. denied *sub nom. Louisiana State Bd. of Educ. v. Lark*, 358 U. S. 820 (1958).

[39] 74 U. S. 118 (1868).

[40] *Id.* at 122 (emphasis supplied).

Supreme Court, have recognized.[41] Indeed the Federal (972) Government itself possesses this power[42] and yet can only be sued with its consent.[43]

Moreover, the only instance cited by plaintiff of a contract entered into allegedly by EDA is that under which the defendant Phillips undertook the development of the petro-chemical complex, and with respect to which plaintiff now seeks a share of the (973) profits. But EDA is not the other party to the agreement. The terms of the agreement show that the Commonwealth of Puerto Rico is the other party. After reference to the Phillips proposal for the petro-chemical complex, the agreement recites, "It is the objective of the Government of the Commonwealth of Puerto Rico and of Phillips Petroleum Co. to implement the proposal described above as promptly as possible." And another section provides that in the event of Phillips' breach of essential provisions, "the Commonwealth may" take certain action as specified. Although the agreement is signed by the administrator of EDA, it is also signed and approved by the governor of Puerto Rico. The obligations thereunder are those of the Commonwealth; indeed the contract contains a section

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[41] This is clear from the many breach of contract actions in which the defense of sovereign immunity or absence of diversity of citizenship has been upheld. See, e. g., *State Highway Comm'n v. Utah Constr. Co.*, 278 U. S. 194 (1929); *Harrison Constr. Co. v. Ohio Turnpike Comm'n*, 272 F. 2d 337 (6th Cir. 1959); *O'Neill v. Early*, 208 F. 2d 286 (4th Cir. 1953); *North Dakota v. National Milling & Cereal Co.*, 114 F. 2d 777 (8th Cir. 1940); *DeLong Corp. v. Oregon State Highway Comm'n*, 233 F. Supp. 7 (D. Ore. 1964), aff'd 343 F. 2d 911 (9th Cir.), cert. denied 382 U. S. 877 (1965).

[42] See *Rex Trailer Co. v. United States*, 350 U. S. 148, 151 (1956); *Atlantic Mut. Ins. Co. v. Cooney*, 303 F. 2d 253, 259 (9th Cir. 1962); *Shepard Eng'r Co. v. United States*, 289 F. 2d 681, 682 (8th Cir. 1961); *Matter of American Boiler Works, Inc.*, 220 F. 2d 319, 321 (3d Cir. 1955); *United States v. Salon*, 182 F. 2d 110, 111-12 (7th Cir. 1950).

[43] See *Maricopa County v. Valley Nat'l Bank*, 318 U. S. 357, 362 (1943); *Minnesota v. United States*, 305 U. S. 382, 387 (1939); *Schillinger v. United States*, 155 U. S. 163, 166 (1894); *North Atlantic & Gulf S.S. Co. v. United States*, 209 F. 2d 487, 489 (2d Cir. 1954).

headed: "Additional Obligations of the Commonwealth." The Commonwealth's commitment, in part, is to grant maximum tax exemption, to participate in the financing and to give support to an oil import allocation by the Department of Interior. In addition, the Commonwealth commitment extends to assurance of cooperation by EDA in obtaining necessary licenses, manpower and electric power. The governmental (974) obligation, so clearly defined in this agreement, and the Commonwealth's right in the event of breach, negate plaintiff's claim that EDA is the party in interest.

Equally unavailing is the plaintiff's position with respect to the maintenance of offices by EDA in the United States and Canada. Its activities there are promotional and informational and intended to publicize industrial and economic opportunities in Puerto Rico. Its' representatives answer inquiries from prospective investors, analyze proposed projects and advise as to their eligibility for tax exemption under the Commonwealth's industrial and economic program. It is not uncommon, and indeed the court may take judicial notice, that states and governments advertise and publicize investment availability, scenic beauty and vacation attractions[44] in an effort to advance their economy (975) and thus promote their general welfare. That EDA performs these functions outside of Puerto Rico does not mean that it sheds its governmental character.

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[44] See, e. g., N. Y. Times, June 19, 1966, §6 (Magazine), p. 80 (advertisement placed by Bahamas Ministry of Tourism); N. Y. Times, May 8, 1966, §6 (Magazine), p. 74 (advertisement placed by Oregon Highway Department); The New Yorker, May 21, 1966, p. 190 (advertisement placed by Arkansas Industrial Development Commission); *id.* at 150 (advertisement placed by Nova Scotia Travel Bureau); The New Yorker, May 14, 1966, p. 83 (advertisement placed by Virginia Department of Conservation and Economic Development); The New Yorker, May 7, 1966, p. 155 (advertisement placed by Quebec Tourist Branch); The New Yorker, April 16, 1966, p. 97 (advertisement placed by U. S. Virgin Islands Government Information Center); *id.* at 38-39 (advertisement placed by Government of Ontario Department of Economics and Development); Punch, Feb. 9, 1966, p. xi (advertisement placed by United States Travel Service).

Considering the nature of the plaintiff's claim, which clearly required a commitment by the Commonwealth of Puerto Rico, the structure, functions and powers of EDA, as defined by the statute which implemented Reorganization Plan No. 10, and EDA's operations, the court is persuaded that under the circumstances here presented EDA was acting as the agency and alter ego of the Commonwealth and that the Commonwealth is the real party in interest; accordingly, the defendant's motion under Rule 12(b) (1) to dismiss for lack of (976) jurisdiction over the subject matter based upon non-diversity of citizenship is granted. This disposition makes it unnecessary to consider defendant's further motions under other subsections of Rule 12, as well as its motion for summary judgment.

II

Phillips' motion for summary judgment presents different issues from those involved in the disposition of Commonwealth's motion to dismiss for lack of jurisdiction, and so reference is necessary to other matters relating to plaintiff's claim.

Plaintiff is an attorney practicing law in New York City more than thirty years, who since 1942 has had some professional and social contacts in Puerto Rico. Up to early May 1961, as he acknowledged upon his deposition, he was unaware of the 1959 Presidential proclamation which restricted oil importation into the United States and Puerto Rico. It first came to his notice when a member of Cirillo Brothers, clients whose corporate enterprises plaintiff represented in admiralty matters, commented upon the difficulty he (977) had experienced in his efforts to obtain an oil import quota license for an affiliated oil and fuel company. Plaintiff then and there checked the regulations and statute and ascertained that Puerto Rico was a sep-

arate district for oil control. He suggested to his client, whose principal interest was in securing a source of fuel oil, that it could be derived as a by-product or surplus of the petroleum feed stock required for an oil refinery and petro-chemical complex. Thus the proposal for a petro-chemical complex had its origin. Plaintiff was of the view that the quota license for the petroleum feed stock for such a project could be secured with the support of the Puerto Rican Government and its officials, a matter hereafter adverted to in greater detail since it represents the hard core of plaintiff's claims under the various theories advanced by him.

Soon after his initial talk with his client[45] (978) plaintiff enlisted the aid of two friends in Puerto Rico to contact Puerto Rican officials in the office of EDA. One was Jose Feliciano; the other was Abraham Nieves, a director of a bank in Puerto Rico, who plaintiff understood was a close friend of Rafael Durand, the head of EDA.

Feliciano, who appears initially to have been uncertain as to whom in authority to contact in Fomento, as EDA was known in Puerto Rico, finally reached Durand and wrote to plaintiff on June 6 that Durand doubted the "Governor will * * * approve any participation of any governmental agency in any other application for increase in quota" because the Commonwealth had previously supported an application for a 20,000 barrel a day increase which had been granted upon condition that no further increase would be applied for. In the same letter Feliciano also conveyed Durand's suggestions that plaintiff file an application for a quota directly with the U. S. Secretary of Interior to see what he could accomplish on his own, and that he write Durand "a letter stating your problem and asking (979) for the cooperation of the Common-

[45] Plaintiff and his clients entered into a joint venture for the development of an oil refinery and related petro-chemical industry in Puerto Rico which was formalized by written agreement in July 1961.

wealth Government on this matter."[46] Finally, Feliciano urged that plaintiff present his program to EDA's representatives in New York.

Plaintiff never followed through on the suggestion that he file an application directly nor did he immediately write Durand. However, during the week of June 19 he did confer at EDA's New York City office with representatives there, Diaz Hernandez and a Mr. Hiquera. Plaintiff testified that he endeavored to "sell" his proposal for a petrochemical complex and to convince them of its value to Puerto Rico; however, as he further acknowledged, those two gentlemen just listened and all they undertook to do was to talk to Durand about the project. As events developed, Hernandez later wrote to EDA in Puerto Rico that while he agreed with the idea of a third refinery, "the Government should not give backing to any specific (980) project at this stage." His view, concurred in by Durand, was that "it would be impracticable for the Commonwealth Government to back the Krisel project at this early stage."

The only other occasion plaintiff personally met with any EDA representative was on or about July 3, 1961 when together with two members of the Cirillo Brothers firm he conferred at the EDA office in Puerto Rico with Sam J. Van Hyning, economic consultant for EDA, to whom they were introduced by Feliciano and Max Goldman, an attorney practicing in Puerto Rico. Plaintiff upon his deposition testified that in essence he repeated the same speech he had made several weeks before to Hernandez and Hiquera in New York but that Van Hyning was "somewhat argumentative about * * * [his] proposals with respect to this complex", and expressed the view that "it would be difficult to get a quota of 50,000 barrels a day * * *." In any event, Van Hyning like the New York EDA representatives deferred to Durand, with whom he said he would take up the matter.

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[46] Plaintiff interprets this statement as an express invitation by EDA to submit his plan for a petro-chemical complex.

It is evident from subsequent correspondence and other documentary matter that Van Hyning was "cold" (981) and unenthusiastic about plaintiff's proposal and doubted the financial capacity of plaintiff and his associates to carry through the proposed project. For a variety of reasons, he was generally of the view that in connection with any third refinery, a daily import quota of 5-15,000 barrels rather than 50,000 barrels reflected a more realistic approach. Plaintiff on the other hand kept urging Feliciano to impress upon EDA officials a program which, based upon his client's needs for residual fuel oil, called for not less than 35-40,000 barrels a day in the initial stages of the project and later for 70,000 barrels a day.

On September 26,[47] Van Hyning wrote to plaintiff that among other matters he could "offer * * * no encouragement whatever concerning the petroleum refinery project * * *. I would not recommend that (982) the Commonwealth Government request a crude oil import quota increase of 70,000 barrels/day."

Plaintiff never met Durand personally. But against the general background of these previous events and interparty correspondence, plaintiff submitted to Durand a formal proposal dated September 25, 1961, which was either personally delivered or mailed to him on September 28 by Nieves.[48] Insofar as here relevant it states:

> "* * * [W]e are conveying to you hereby our program for the development of an industrial complex in Puerto Rico predicated on your Government issuing to our enterprise a commitment that:

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[47] This letter appears to have been forwarded before plaintiff's letter of September 25 was delivered to Durand on September 28.

[48] Plaintiff had sent the proposal on to Nieves with a request that it be hand delivered to Durand. Nieves in his affidavit states he mailed the letter, but plaintiff refers to a communication from Nieves which plaintiff suggests shows the letter was hand delivered.

"1. The Commonwealth government will obtain a quota of foreign crude oil, preferably Venezuelan, for our use sufficient in barrelage per day to warrant our going ahead with our plans.

(983) "c). *The Oil Refinery*

"We contemplate erecting a plant with a capacity for processing, ultimately, 70,000 barrels of Crude Oil per day. To begin with, for the first 2-3 years, at least 35-40,000 barrels per day should be put through this refinery if we are to develop some of the industries hereinafter set forth, which will be based on the petroleum derivatives."

On October 16, Durand advised the plaintiff that the "Commonwealth of Puerto Rico will not entertain a commitment to satisfy the first condition stated in your letter of September 25 to me."

As noted in the discussion under the Commonwealth motion, the Phillips Petroleum Company in January 1964, with Commonwealth support, filed application for a 50,000 barrel per day quota of selected feed stock to be imported into Puerto Rico for refinement and use in a proposed petro-chemical complex. The successive and intermediate steps, which preceded the final contract in May 1965 between Phillips and the Commonwealth for the construction of the project, following final approval by the Department of Interior, have also been referred to.

Plaintiff had no dealings with Phillips; his sole contact was the claim letter he sent in February (984) 1965, followed by this law suit commenced in September 1965. His claims against Phillips are hinged to those asserted against EDA, the merits of which were not reached in the EDA motion. They must necessarily be analyzed on the defendant Phillips' cross motion for summary judgment.

Plaintiff's basic claim, however elaborated, is that his proposal for a petro-chemical complex was novel, unique

and original; that it was disclosed by him and by Feliciano and Nieves acting on his behalf to EDA and its officials, Durand and Van Hyning in Puerto Rico and Hernandez and Hiquera in New York City, in trust and confidence and upon EDA's and its officials' agreement that the plan would not be revealed; that contrary thereto EDA and its officials disclosed the plan to Phillips, with whom it thereafter entered into an agreement for the development of the complex; that EDA, its officials, and Phillips, the latter with notice of plaintiff's rights and his relation to EDA, appropriated his idea and property.

Plaintiff's separate causes of action against EDA for damages and equitable relief, as variously (985) denominated by him, are for (1) breach of contract, either (a) express,[49] (b) implied in fact[50] or (c) implied in law,[51] (2) breach of trust and confidential relationship[52] and

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[49] See *Bristol v. Equitable Life Assur. Soc'y*, 132 N. Y. 264, 267 (1892); *Cole v. Phillips H. Lord, Inc.*, 262 App. Div. 116, 28 N. Y. S. 2d 404, 409 (1st Dep't 1941); *Anderson v. Distler*, 173 Misc. 261, 17 N. Y. S. 2d 674, 678 (Sup. Ct. 1940).

[50] See *Official Airlines Schedule Information Serv., Inc., v. Eastern Air Lines, Inc.*, 333 F. 2d 672, 675 (5th Cir. 1964) (concurring opinion); *Robbins v. Frank Cooper Assocs.*, 14 N. Y. 2d 913 (1964), reversing 19 A. D. 2d 242, 241 N. Y. S. 2d 259, 261 (1st Dep't 1963). Cf. *LaVarre v. Warner Bros. Pictures, Inc.*, 282 N. Y. 68 (1939).

[51] See *Grombach Prods., Inc., v. Waring*, 293 N. Y. 609, 615 (1944); *Robbins v. Frank Cooper Assocs.*, 19 A. D. 2d 242, 241 N. Y. S. 2d 259, 261 (1st Dep't 1963), rev'd on other grounds 14 N. Y. 2d 913 (1964); *Carneval v. William Morris Agency, Inc.*, 124 N. Y. S. 2d 319, 320 (Sup. Ct. 1953), aff'd 284 App. Div. 1041, 137 N. Y. S. 2d 612 (1st Dep't 1954).

[52] See *Matarese v. Moore-McCormack Lines, Inc.*, 158 F. 2d 631, 634-35 (2d Cir. 1946). The cause of action for breach of trust and confidential relationship is not in fact a separate and distinct one but is merely a different denomination for the cause of action upon an implied in law contract. See *Robbins v. Frank Cooper Assocs.*, 19 A. D. 2d 242, 241 N. Y. S. 2d 259, 261 (1st Dep't 1963), rev'd on other grounds, 14 N. Y. 2d 913 (1964).

(3) misappropriation (986) of property.[53] As to Phillips, the causes of action asserted are that it knowingly participated in and induced a breach of (1) the contract not to disclose,[54] (2) the relationship of trust and confidence between plaintiff and EDA,[55] and (3) that it misappropriated (987) plaintiff's property.[56] In his supplemental brief, plaintiff states that the program allegedly misappropriated by Phillips was "a property right which is subject to the usual rules of property, and entitled as such to the protection of law."

Plaintiff's program, according to him, was "finalized" and put into concrete form in his letter dated September 25, 1961. He himself summarizes the five important elements of his program as outlined in that letter as follows:

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[53] See *Flexitized, Inc., v. National Flexitized Corp.*, 335 F. 2d 774, 781 (2d Cir. 1964), cert. denied, 380 U. S. 913 (1965); *Norwich Pharmacal Co. v. Sterling Drug, Inc.*, 271 F. 2d 569, 572 (2d Cir. 1959), cert. denied 362 U. S. 919 (1960); *Miller v. Universal Pictures Co.*, 18 Misc. 2d 626, 188 N. Y. S. 2d 386, 393 (Sup. Ct. 1959), rev'd on other grounds 11 A. D. 2d 47, 201 N. Y. S. 2d 632 (1st Dep't 1960), aff'd 10 N. Y. 2d 972 (1961); *Dior v. Milton*, 9 Misc. 2d 425, 155 N. Y. S. 2d 443, 455-56 (Sup. Ct.), aff'd 2 A. D. 2d 878, 156 N. Y. S. 2d 996 (1st Dep't 1956). Despite language in the cases cited discussing property rights, that the New York courts would accord protection to an idea or program in the absence of either a contractual, confidential or other fiduciary relationship is not altogether clear. See *Norwich Pharmacal Co. v. Sterling Drug, Inc., supra*, at 572 n. 6; *Galanis v. Proctor & Gamble Corp.*, 153 F. Supp. 34, 37 (S.D.N.Y. 1957); *O'Brien v. RKO Radio Pictures, Inc.*, 68 F. Supp. 13, 14 (S.D.N.Y. 1946); *Grombach Prods., Inc., v. Waring*, 293 N. Y. 609, 616 (1944); *Bristol v. Equitable Life Assur. Soc'y*, 132 N. Y. 264, 267 (1892).

[54] See *Phillips v. Belding Heminway Co.*, 50 F. Supp. 1015, 1019 (S.D.N.Y. 1943); *Hornstein v. Podwitz*, 254 N. Y. 443, 448 (1930); *Lamb v. S. Cheney & Son*, 227 N. Y. 418 (1920).

[55] See *Jackson v. Smith*, 254 U. S. 586, 589 (1921); *Irving Trust Co. v. Deutsch*, 73 F. 2d 121, 125 (2d Cir. 1934), cert. denied *sub nom. Irving Trust Co. v. Bankers Trust Co.*, 294 U. S. 708 (1935).

[56] Cf. *Damis v. Barcia*, 266 App. Div. 698, 40 N. Y. S. 2d 107 (3rd Dep't 1943), overruled on other grounds, *Stanton Motor Corp. v. Rosetti*, 11 A. D. 2d 296, 203 N. Y. S. 2d 273 (3rd Dep't 1960); *Phelps v. McQuade*, 158 App. Div. 528, 143 N. Y. Supp. 822 (1st Dep't 1913, aff'd 220 N. Y. 232 (1917); *Ross v. Leuci*, 194 Misc. 345, 85 N. Y. S. 2d 497, 501 (N. Y. City Ct. 1949).

"(1) the petrochemical complex with its economic and employment aspects for the particular benefit of Puerto Rico;

"(2) the importation of cheap crude • • • oil by low cost water transportation from Venezuela which made it economically attractive;

"(3) tax exemption by the Commonwealth of Puerto Rico;

(988) "(4) participation in the investments by Puerto Rico and its people; and

"(5) *most important of all*, a means of importing the necessary oil—a means of opening the quota door—by the use of political prestige, power, and leverage of Puerto Rico and its economic needs." (Emphasis supplied)

This last item—the use of the political prestige and power in support of the quota application—is the hard core of his claim of an original idea and property right. He acknowledges, although grudgingly, that concepts of a petrochemical complex, the importation of oil feed stock, tax exemption, and investment in projects by the Puerto Rican public, were within the knowledge and experience of Puerto Rican and EDA authorities in furtherance of "Operation Bootstrap." But plaintiff contends these separate concepts were, to use his language, "the expression of disconnected, generalized ideas which may have been before EDA in the past," until he conceived "a practical integration of ideas into a homogeneous, concrete and definite program. This was and is the real uniqueness of my program—for the first time it was all in one package ready to use."

(989) Plaintiff repeatedly, in one way or another in his affidavit in opposition to the motion for summary judgment, in his deposition and in his several briefs empha-

sizes that the "valuable idea, plan and program" allegedly entrusted to EDA in confidence and appropriated by Phillips was the concept of using the political power and governmental prestige to secure the daily barrelage necessary for the contemplated project. He summed it up in his deposition, when he characterized the condition in his letter of September 25, that the Commonwealth commit itself to obtaining a foreign quota of crude oil "as the foundation stone of the entire program," and added, "my whole object was to utilize the position of the Puerto Rican governor, Munoz-Marin, and the Puerto Rican government's economic program • • • its prestige • • •."

Phillips not only urges that plaintiff's claims against EDA are without foundation, but further presses that his claim of novelty, upon its face, is so utterly lacking in substance that it presents no issue of fact. It also argues that an essential ingredient of each of plaintiff's causes of action, 990) no matter what theory is advanced, is novelty and since it is lacking, all his claims must fall.

In resisting the motion, plaintiff contends that his claim of novelty presents an issue of fact which alone requires its denial. He further argues that even if it be held upon the undisputed facts that his program is not novel, nonetheless, factual issues remain as to (1) the relationship of trust and confidence between him and EDA, (2) the existence of an agreement, whether express or implied in fact or in law, that the program would not be disclosed to third parties, and (3) whether Phillips, aware of plaintiff's alleged trust and contractual relationship with EDA, misappropriated his property; that these issues likewise require denial of the summary judgment motion. In any event, he contends he should not be foreclosed from an opportunity to depose Feliciano and Nieves, who, in affidavits submitted on this motion, have denied the bases of his various causes of action.[57]

[57] Durand and VanHyning have also submitted affidavits categorically denying the essentials of plaintiff's claims.

(991) In this diversity action, the initial question is what substantive law the courts of New York would apply in determining the validity of plaintiff's claim. Both New York and Puerto Rico had substantial contacts with the matter in dispute, but the parties at a conference with the Court agreed that New York law governs, particularly so in the absence of authoritative holdings by the Puerto Rican courts on the issues here presented.[58]

The Court does not reach the issue of novelty on which the parties have concentrated much of their respective arguments. Contrary to the defendant's contention, a determination favorable to it on the novelty question would not dispose of all of plaintiff's theories of recovery. Plaintiff asserts that his program was entrusted to EDA upon an express agreement (992) that it would not be disclosed and would be treated in confidence. Under New York law, an idea, if valuable, even though it does not contain novel, secret or confidential material, may be protected by such an agreement. This doctrine applies even when the subject matter of the idea is common or open to public knowledge.[59]

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[58] See *Walton v. Arabian American Oil Co.*, 233 F. 2d 541, 545-46 (2d Cir.), cert. denied 352 U. S. 872 (1956); *Gaines v. Jacobsen*, 308 N. Y. 218, 221-22 (1954); *Aghnides v. Aghnides*, 159 N. Y. S. 2d 343, 347 (Sup. Ct.), aff'd 4 A. D. 2d 498, 167 N. Y. S. 2d 201 (1st Dep't 1957).

[59] See *Bristol v. Equitable Life Assur. Soc'y*, 132 N. Y. 264, 267 (1892); *Miller v. Universal Pictures Co.*, 11 A. D. 2d 47, 201 N. Y. S. 2d 632, 634-35 (1st Dep't 1960), aff'd 10 N. Y. 2d 972 (1961); *Cole v. Phillips H. Lord, Inc.*, 262 App. Div. 116, 28 N. Y. S. 2d 404, 409 (1st Dep't 1941); *High v. Trade Union Courier Publishing Corp.*, 31 Misc. 2d 7, 69 N. Y. S. 2d 526, 529 (Sup. Ct. 1946), aff'd 275 App. Div. 803, 89 N. Y. S. 2d 527 (1st Dep't 1949). See also *Miller v. Universal Pictures Co.*, 10 N. Y. 2d 972, 973, 976-77 (1961) (dissenting opinion), where it is said: "The fundamental law is that where there is an agreement * * * the parties to the contract must remain faithful to its terms whether or not the disclosure is novel or original * * *. 'There is nothing unreasonable in the assumption that a producer would obligate himself to pay for the disclosure of an idea * * * *which in fact, he would be unable to use but for the disclosure* * * *. The test for a property right, applied in common-law copyright cases, is that the work be new, novel and in concrete form * * *. Not only is this property right test not a

(993) It is of course true that the mere assertion of a claim is not by itself sufficient to ward off summary judgment.[60] Generally a party is entitled to a trial only if he "set[s] forth specific facts showing that there is a genuine issue for trial,"[61] and plaintiff in neither his affidavit nor his deposition has set forth sufficient facts to support an express contract of non-disclosure or confidentiality of his program. His deposition testimony as to his only two direct contacts with EDA officials, with Hernandez and Hiquera in New York and Van Hyning in Puerto Rico, reflects that these men neither made any commitments to plaintiff nor were requested to make any. The sum total of their meetings was that the officials stated that the matter would be taken up with Durand. Plaintiff, when asked, (994) "Did * * * [Hernandez and Hiquera] undertake not to talk with anyone about your project," responded, "I don't recall they undertook to do anything except to talk to Mr. Duran about this project." As to his talk with Van Hyning, plaintiff testified that the latter only "said he would take it up with Mr. Duran, the entire project"; when specifically pressed whether Van Hyning made any undertaking to him, plaintiff said, "* * * I don't understand—'undertaking' to me means did he make a contract. Did he make a contract with me? The answer is 'No.' * * * He undertook to take the matter up with Mr. Duran."

(Footnote continued)

part of any traditional contract action * * *. The *reason* for the requirement in common-law copyright was that to have a remedy good against the world, a property right must be shown. *This reason for the test is missing in an action 'on a contract.'*"

[60] See *Dressler v. The MV Sandpiper*, 331 F. 2d 130, 132 (2d Cir. 1964); *Peter Pan Fabrics, Inc., v. Dixon Textile Corp.*, 280 F. 2d 800, 804 (2d Cir. 1960); *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (2d Cir. 1943).

[61] Fed. R. Civ. P. 56(e). Accord, *Dressler v. The MV Sandpiper*; 331 F. 2d 130, 133 (2d Cir. 1964).

Plaintiff claims however, that his program was entrusted by him in confidence to Feliciano and Nieves, who acted on his behalf in their discussions with and presentation of the matter to Durand and other EDA officials and that an express agreement of non-disclosure resulted. He also emphasizes that his letter of September 25, 1961 not only was marked "confidential" but under his instructions to Nieves was to be delivered personally by the latter to Durand. Both Feliciano and Nieves, contrary to plaintiff's contention, deny that the (995) proposal or any information with respect thereto was ever submitted by them to Durand or Feliciano or any EDA officials upon any agreement or understanding of non-disclosure or non-use of the information. Seemingly, this should end this aspect of the matter. But plaintiff challenges the denials of his erstwhile friends, who, he asserts, are now hostile witnesses who have yielded to local influences and urges that a pretrial examination of them and those EDA representatives with whom they conferred on his behalf will establish, contrary to their present positions, that an express agreement was made.

In the circumstances, however tenuous plaintiff's claim may appear, he should be afforded an opportunity to depose those he alleges have betrayed his interest. They and the Puerto Rican officials with whom they met on plaintiff's behalf have exclusive knowledge of the events upon which plaintiff's claim of an express contract must rest. Under the circumstances, Rule 56(f) requires that plaintiff be given an (996) opportunity to inquire into these events.[62] Accordingly, the motion by Phillips for summary judgment is denied but without prejudice to renewal upon completion of the depositions.

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[62] See *Dombrovskis v. Esperdy*, 185 F. Supp. 478, 484 (S.D.N.Y. 1960), aff'd 321 F. 2d 463 (2d Cir. 1963); *Peckham v. Bonrico Corp.*, 7 F.R.D. 324, 330-31 (D.P.R. 1947), rev'd on other grounds 171 F. 2d 653 (1st Cir. 1948); *Schultz v. Manufacturers & Traders Trust Co.*, 32 F. Supp. 120, 121 (W.D.N.Y. 1940). See generally 6 Moore, Federal Practice ¶56.24 (2d ed. 1965).

III.

There remains for final consideration the plaintiff's motions addressed to the defense of laches and also to the separate defense that the complaint fails to state a claim upon which relief may be granted. There is no basis for granting these motions at this time,[63] (997) and they are denied.

Dated: New York, N. Y.
August 17, 1966

EDWARD WEINFELD
United States District Judge

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[63] As to the defense of laches, an issue of fact is presented. See Oil & Gas Ventures—*First 1958 Fund, Ltd., v. Kung*, 250 F. Supp. 744, 753 (S.D.N.Y. 1966); *Haine v. Googe*, 248 F. Supp. 349, 352 (S.D.N.Y. 1965); *Dictograph Prods. Co. v. Sonotone Corp.*, 95 F. Supp. 126, 127 (S.D.N.Y. 1951); *Greenspon v. Parke, Davis & Co.*, 8 F.R.D. 485 (S.D.N.Y. 1948). See generally 3 Barron & Holtzoff, Federal Practice & Procedures §1245, at 208 (Wright ed. 1958) ("[T]he defense of laches generally raises issues of fact * * *"). As to the defense of failure to state a claim, plaintiff's motions raise essentially the same issue as Phillips' cross-motion for summary judgment—the substantive merit of plaintiff's claim for relief. Cf. *Lehmann Trading Corp. v. J & H Stolow, Inc.*, 184 F. Supp. 21, 22 (S.D.N.Y. 1960). Since this question is yet to be passed upon, no purpose would be served by now striking the defense. A motion to strike a defense will be denied where, as here, there are questions of fact to be determined. See *Moriarty v. Curran*, 18 F.R.D. 461, 462 (S.D.N.Y. 1956); *Hill, Brown Corp. v. Bosler*, 14 F.R.D. 170, 172 (D.R.I. 1953); *Reid v. Doubleday & Co.*, 109 F. Supp. 354, 357 (N. D. Ohio 1952).

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1189

MAURICE A. KRISEL, *Petitioner,*

v.

RAFAEL DURAN, SAM VAN HINING, PHILLIPS PETROLEUM COMPANY and ECONOMIC DEVELOPMENT ADMINISTRATION OF PUERTO RICO, *Respondents.*

BRIEF FOR RESPONDENT IN OPPOSITION

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MAURICE A. KRISEL, *Petitioner,*

v.

RAFAEL DURAN, SAM VAN HINING, PHILLIPS PETROLEUM COMPANY and ECONOMIC DEVELOPMENT ADMINISTRATION OF PUERTO RICO, *Respondents.*

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether diversity of citizenship jurisdiction, confined by Constitution and statute to controversies between "Citizens of different States," extends to a suit, in effect, between a State, allegedly in respect of its "proprietary" activities, and a Citizen of another State.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Constitutional provision and statute contained in Appendix A to the Petition, the following are also relevant:

Article III, Section 2, United States Constitution:

> "The judicial Power shall extend . . . Controversies . . . between Citizens of different States."

23 L.P.R.A. § 231. *"Economic Development Administration Organized.*

> "The Economic Development Administration created under Reorganization Plan No. 10 of 1950 is hereby organized to operate as an agency of the Government of Puerto Rico in accordance with the provisions of Sections 231-241 of this title."

STATEMENT OF THE CASE

Petitioner brought this action in 1965 against the Economic Development Administration of Puerto Rico (E.D.A.).[1] The Government of the Commonwealth of Puerto Rico, through its Attorney General, timely moved to have the complaint dismissed as to defendant E.D.A. on the ground that because the Commonwealth

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[1] And against Rafael Durand, then the Administrator of E.D.A.; Sam Van Hyning, Economic Consultant to E.D.A., and Phillips Petroleum Company. Petitioner has never effected service of process upon the named individual defendants. (Nor has process been served either upon the chief executive officer of E.D.A. or upon anyone else "prescribed by law," as required by Rule 4(d)(6) of the Federal Rules.) No issue is presented here as to these individual defendants.

This Brief shall use the correct spelling of the names Durand and Van Hyning. Erroneous versions reflected in the caption of this case stem from Petitioner's having misspelled them in his complaint.

is the real party in interest in respect to the controversy and has not consented to be sued in the United States District Court in New York, that Court lacked both subject matter and personal jurisdiction.[2] United States District Judge Edward Weinfeld dismissed the complaint against E.D.A. on the ground that since the Commonwealth was the real party in interest this was not a suit between "Citizens of different States," and hence there was no diversity jurisdiction under 28 U.S.C. § 1332. On December 6, 1967, the Court of Appeals for the Second Circuit (Friendly, Kaufman, and Anderson, C.J.s) affirmed in a *per curiam* opinion, rejecting all of the arguments now advanced in this Court by Petitioner.

The facts out of which this litigation arises are as follows. In 1950 the Commonwealth created E.D.A. as an "agency of the Government of Puerto Rico" (23 L.P.R.A. § 231) to engage in economic research, encourage private industrial investment on the island and promote tourism. The agency is not incorporated, cannot sue or be sued, and has for its only source of revenue annual appropriations by the Legislature.[3]

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[2] The Commonwealth also raised additional, independent and adequate grounds for dismissing the complaint; namely, that service of process did not comply with the Rules, and that the complaint failed to state a cause of action upon which relief could be granted. None of these issues were reached below.

[3] 23 L.P.R.A. §§ 231-239. See generally, Judge Weinfeld's opinion, at pp. 32-33 of Petition (Appendix B). Certain other related activities, operational in character and more appropriately exercised by an agency with capacity to sue or be sued, were left in the hands of the Puerto Rico Industrial Development Company, or PRIDCO. See 23 L.P.R.A. § 274, and Judge Weinfeld's opinion, at pp. 34-35 of the Petition (Appendix B).

For nearly a dozen years, a key element in the Commonwealth government's plans for promoting private industry has been the petro-chemical industry. E.D.A. personnel have authored a number of scholarly studies relating to the establishment of petro-chemical facilities in the Commonwealth. (See Affidavit of Sam Van Hyning, pp. 15a-19a, Appendix to Brief for Appellee in the Court below.) Before Presidential Proclamation No. 3279 in 1959 instituted mandatory quota restrictions on the importation of oil into the United States (including Puerto Rico), two petro-chemical facilities had with E.D.A.'s assistance already been constructed in Puerto Rico. At open hearings of the Oil Import Administration in 1959, E.D.A. supported requests by the Commonwealth's petro-chemical companies for an increase in their Federal oil quota. (See Judge Weinfeld's opinion, at p. 30 of Petition (Appendix B).)

Against this background, Petitioner, a New York attorney with no serious background in the petro-chemical industry, late in 1961 "disclosed" what he now regards as a "novel idea" for which he seeks compensation amounting to millions of dollars. Petitioner "informed" E.D.A. that, if a further oil import quota could be obtained, a third petro-chemical facility might profitably be built in the Commonwealth. The crux of his idea was the proposition that the Commonwealth and its then Governor, Luis Munoz Marin, should use his influence in Washington to this end. As Petitioner himself described the core of his "idea", it was

> "that E.D.A. should use the weight of the economic needs and political prestige of Puerto Rico to induce the Government of the United States to change its oil import restrictions to allow a large

and sustained quota of foreign crude oil to be imported into Puerto Rico." (Appellant's Reply Brief in the Court of Appeals, p. 2).

From the outset, Petitioner was advised that other groups of investors had proposed similar arrangements, that some of them had already contacted the Department of the Interior on their own motion to explore the possibility of an expanded quota, but that the Commonwealth had decided for the time being that it wished to allocate its political prestige to other matters then pending before the Federal government.[4] Petitioner, however, rejected E.D.A.'s suggestion that he file his own application directly with the Secretary of the Interior. After a final unsuccessful effort to reach the Governor of the Commonwealth, Petitioner dropped the matter.

Three years later, in May 1964, Phillips Petroleum Company, with E.D.A. support, did apply to the Secretary of the Interior for an oil import quota for use in Puerto Rico. In February 1965, the Secretary of the Interior announced that he favored the establishment by Phillips of a third major petro-chemical complex in Puerto Rico. Petitioner then brought this suit, claiming that the notion of Puerto Rican government support for a private oil import quota was "his" and seeking damages in the amount of $30,000,000, an injunction against Phillips' using its Federal oil quota, an accounting of all profits, and the impressing of a trust.

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[4] See Appellant's Appendix in the Court of Appeals, pp. 166a-169a; Appellee's Appendix, p. 26a. Petitioner himself wrote to a friend in 1961 that he had been told "that other people are trying to do what I am now doing." Appellant's Appendix, at p. 111a.

ARGUMENT

Both the Court of Appeals and Judge Weinfeld held that this was a suit against the Commonwealth of Puerto Rico, that the Commonwealth was the real defendant in interest, and that since the Commonwealth is not a "Citizen" of itself for purposes of diversity jurisdiction, the District Court lacked subject matter jurisdiction.[5] Petitioner does not seriously challenge the carefully documented fact determination that the Commonwealth is the real party in interest. (He would be hard pressed to do so in light of the structure, functions and powers of E.D.A.—its lack of power to sue or be sued, its lack of independence or autonomy, and its lack of resources other than what the Commonwealth Legislature appropriates to it.) Rather, Petitioner seeks to avoid this fact determination by suggesting a new notion:—that even if the Commonwealth is the real party in interest, when it engages in "proprietary" activities it ceases to be a Commonwealth and becomes instead a "Citizen" of itself for purposes of diversity jurisdiction.

There are several answers, all suggesting that the determination below is hardly worthy of review here:

1. In the first place, Petitioner's new doctrine is wide of the mark in this case. The E.D.A. activities involved here—expenditure of the Commonwealth's political prestige in Washington in support of a private

[5] Although the Eleventh Amendment does not apply in terms to the Commonwealth of Puerto Rico, at issue is its construction as well as that of the federal diversity of citizenship jurisdiction. Under 28 U.S.C. § 1332 Puerto Rico is to be treated as though it were a State. Accordingly, since the meaning of the words "State" and "Citizen" are involved, any decision in this case affects the right of citizens to sue States.

oil import quota application at the Department of the Interior, and the granting of a local tax exemption—are "governmental" in any lexicon.

2. Furthermore, the law is well settled that a suit against an agency of a State will not lie in diversity jurisdiction if that agency is in fact the State, (or as the point is usually made, is the *"alter ego"* of the State), whether its functions fall on one side or the other of the meandering line between "proprietary" and "governmental." See *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278 U.S. 194 (1929). See also *Postal Telegraph Cable Co.* v. *Alabama*, 155 U.S. 482, 487 (1894); *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48, 63 (1904).

3. There is no conflict among the Courts of Appeals on the point. Petitioner refers the Court to *Gerr* v. *Emrick*, 283 F.2d 293 (3d Cir. 1960), *cert. denied*, 365 U.S. 817 (1961), and to *S.J. Groves & Sons Co.* v. *New Jersey Turnpike Authority*, 268 F. Supp. 568 (D.N.J. 1967). Neither, however, adopts the "proprietary-governmental" test Petitioner urges. Both are quite in harmony with the decision of the Court of Appeals for the Second Circuit. Both explicitly hold that State agencies, if *alter egos* of the State, are not Citizens of the State for purposes of diversity jurisdiction. The difference is in the facts and in the result; the New Jersey Turnpike Authority, with authority to sue and be sued, to issue bonds and to acquire and hold its own property—and thus with the ability to satisfy judgments from its own resources—is palpably a different kind of entity for diversity purposes than the Economic Development Administration of the Commonwealth of Puerto Rico. There is, therefore, no conflict of decision among the Circuits.

4. Finally, Petitioner urges the Court to approach the question with "flexibility." For this, he relies on *Mason* v. *American Express Company,* 334 F.2d 392 (2d Cir. 1964), where for diversity purposes the Court of Appeals assimilated the status of an unincorporated association to that of a corporation. This is, of course, a different question. The Court in *Mason* reached a determination obstructed by no such Constitutional, linguistic, and precedential obstacles as confront Petitioner here.

But even *its* relatively modest expansion of diversity jurisdiction was disapproved by this Court in *Steelworkers* v. *Bouligny, Inc.,* 382 U.S. 145, 152, note 10 (1965). Expressly declining to follow *Mason* and criticizing its reasoning, the Court observed that in recent years Congress has narrowed the diversity jurisdiction. With respect to the concededly persuasive policy arguments in favor of treating unincorporated associations like corporations it concluded, at pages 150-151:

> "We are of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts."

So too here.

CONCLUSION

Because the decisions below are clearly correct, because there is no conflict among the Courts of Appeals, and because no other reason exists for review, certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

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In its Brief in Opposition the Respondent has for the first time sought to distinguish the cases of *Gerr* v. *Emrick,* 283 F.2d 293 (3d Cir. 1960), cert. den., 365 U.S. 817 (1961), and *S. J. Groves & Sons Co.* v. *New Jersey Turnpike Authority,* 268 F. Supp. 568 (D.N.J. 1967), which petitioner has cited as in conflict with the decision below, on the ground that those cases "explicitly hold" that agencies of the State, "if alter egos of the state," are not subject to the diversity jurisdiction of the federal district courts. The "explicit" holding in those cases, however, was that the New Jersey Turnpike Authority *is* subject to suit in the United States District Court under diversity of citizen-

ship, because it should be treated as a citizen of the State of New Jersey not entitled to sovereign immunity. Any statements in those opinions to the effect that a state agency is *not* subject to suit in the United States courts, whether the expression "*alter ego* of the State" is used or not, is *obiter* to the facts actually found in those cases. The Petitioner's argument that the decision below in the instant case conflicts with those decisions rests on the similarities in significant respects between the New Jersey Turnpike Authority and the E.D.A., including the proprietary nature of the functions of both agencies; the ability of both agencies to respond to suits (E.D.A. has access to all the resources of PRIDCO); the broad powers of both agencies to carry on their proprietary functions (E.D.A. derived from PRIDCO the many functions described in Petitioner's statement of facts). To state that the E.D.A. is, and that the Turnpike Authority is not, the "alter ego" of a state does not provide a significant distinction. The two cases cited above amply demonstrate that Respondent errs in proposing that only Congress can extend the diversity jurisdiction of the Federal Courts to embrace an agency like E.D.A. The courts in those cases have already shown that Congress has given them that jurisdiction, and the decision below is in conflict with that holding.

Respectfully submitted,

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